IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 440 OF 1998

Shri Madhav Narayan Agaskar .. Appellant
(Orig.Deft no.1)

V/s

1. Shri Vinayak Narayan Agaskar
2. Shri Chintaman Kisan Koli
3. Sajiraj Thankappan ... Respodnents
(No.1 orig.plff)

Shri S.G.Deshmukh for the Appellant
Shri A.V.Joshi for Respondent no.1

CORAM:S.R.SATHE,J.
DATED: 16th Jan. 2007

ORAL JUDGMENT :-

1.The Appellant original defendant No.1 in Regular Civil Suit No.4 of 1992 has preferred this Second Appeal against the judgment and order passed by the

Court of the Additional District Judge,Thane in Civil Appeal No.107 of 1996 whereby the order passed by the trial Court granting decree in favour of the plaintiff was confirmed and the appeal was dismissed.

2. For the sake of convenience hereafter the parties shall be referred to as the plaintiff and defendants.

3. Brief facts giving rise to this appeal are as under:-

. The house property popularly known as ‘Saraswati Niwas’ and ‘Rama Niwas’ situated on CTS no.302 and 305 respectively at Chendani, Thane was initially owned by one Narayan Agaskar. After his death his son Jaywant instituted a suit for partition against his step brothers viz. Vasant, Madhav and Vinayak and mother Indirabai bearing Suit No.Special Civil Suit NO.43 of 1950. A preliminary decree was passed in the said suit and as per request of the parties Advocate Shri B.G.Oka was appointed as a Court Commissioner to effect partition and also to sale house property known as ‘Saraswati Niwas’ by auction. During auction it was purchased by Bhats. As per sale deed executed by the Court Commissioner in favour of Bhats they were given right of way of 12’ width through the property known as ‘Rama Niwas’. According to the plaintiff final decree was passed in

the matter vide Exh.39 on 7-10-1971. Thus partition took place as per final decree. The property known as Plot A1 was allotted to the share of the present plaintiff Vinayak while properties A2, B1 and B3 were allotted to Vasant, Madhav and Indirabai respectively. The property of the present plaintiff is situated on the Southern side and for the purpose of going to the said property from the public road one has to go through 12’ width passage mentioned in the sale deed executed in favour of Bhats. As per said deed not only Bhats but all those who are required to occupy the property ‘Saraswati Niwas’ or ‘Rama Niwas’ are entitled to use the said passage. Initially the present plaintiff as well as his step brother Vasant were doing business of running cycle stand in the name and style VN and VN Cycle stand and at that time they used to make use of the said passage. However, after Bhats filed a suit bearing Suit NO.21 of 1978 and decree was passed in their favour whereby the present plaintiff and his brothers were directed to keep the said 12’ width passage open and not to obstruct the same in any manner, they stopped to park their vehicles in the passage. The plaintiffs thereafter started independent business of cycle stand. However, the defendants obstructed the passage as a result of the same the plaintiff was not in a position to carry his business and to go to his property i.e. A1 shown in the map attached to the

final decree. Hence the plaintiff filed the present suit for permanent injunction restraining the defendants from creating any obstruction in the use and enjoyment of 12’ width passage leading to the plaintiff’s property from Keshavrao Padhye Road as shown in the plan annexed to plaint and in the map Exh-79.

4. The defendant no.1 filed his written statement at Exh.12 and opposed the suit claim. Firstly, he contended that plaintiff had in fact filed Special Darkhast No.25 of 1991 to get the relief of injunction, however, the same was rejected. They also contended that common passage does not exist beyond the property of the plaintiff and defendant no.2. He also contended that he never obstructed plaintiff to use the passage. Hence on all these grounds he prayed for dismissal of the suit. The defendant no.2 filed his written statement at Exh.17 and denied that he used to 0park his two vehicles in the common passage. Hence he also prayed for dismissal of the suit.

5. On these pleadings the learned trial Judge framed issues at Exh.29. In order to prove the suit claim plaintiff Vinayak Agaskar examined himself at Exh.36 and witness Prabhakar Satghare at Exh.57. As against this the defendant no.1 Madhav Agaskar examined

himself at Exh.60. Both the parties produced several documents.

6. After considering the evidence adduced by both the parties the learned trial Judge came to the conclusion that entire road starting from Keshavrao Padhye Road ending to the plot of plaintiff and as shown in the Map to the final decree drawn in Special Civil Suit No.43 of 1950, the passage is common and the defendants obstructed the plaintiff's vahiwat of the said passage by parking their scooters. Hence, the learned trial Judge issued permanent injunction restraining the defendants from causing obstruction in use and enjoyment of the suit passage shown in the plan Exh.40 attached to the final decree Exh.79.

7. Being aggrieved by the said order the original defendant no.1 Madhav Agaskar filed Civil Appeal No.107 of 1996. The said appeal also came to be dismissed. Hence the original defendant filed the present second appeal.

8. From perusal of the record it appears that while admitting the appeal this court (Coram:D.K.Deshmukh,J) has passed the following order:

"Admit, on the substantial question of law on

ground NO.20. To be heard with Second Appeal No.82 of 1984.

. The said ground is as under :-

" Ground No.20) That the Courts below should have seen that the plaintiff had suffered and had thereby acquiesced to the first defendant using the part of the property put to the share of the first defendant and his mother for the purposes of running his independent business since 1976. In the circumstances the plaintiff is not at all entitled to seek any injunction in respect of the said property as late as in 1992. The equitable relief of injunction is obviously not available to a person who is not vigilant or diligent about his so called right and when his suit obviously suffers from laches."

9. It is not in dispute that house property known as ‘Saraswati Niwas’ and ‘Rama Niwas’ was initially owned by Narayan Agaskar and in Special Civil Suit NO.43 of 1950 decree for partition was passed and Court Commissioner was appointed to take accounts and partition the property and in pursuance of the said decree a request was made by the parties that the house property known as ‘Saraswati Niwas’ be sold in auction and accordingly the Court Commissioner held

auction and property ‘Saraswati Nivas’ was sold to Bhats. It is also admitted that in the said sale deed it was specifically mentioned that passage of 12’ width shown by letter ABCD in the map is given to Bhats so as to enable them to approach their property. It was also made clear that the said passage shall be used by both i.e. Bhats as well as the occupants of Rama Niwas. It is an admitted fact that Bhats thereafter filed Regular Civil Suit No.21 of 1978 against Agaskar including the present plaintiff and prayed for declaration and injunction in respect of the said passage. The said suit was opposed by the defendants viz. Agaskar including the present plaintiff. However, it seems that final decree Exh.79 was passed in the above mentioned suit No.43 of 1950 and thereafter property shown as A1 in the map attached with the final decree was allotted to the share of the present plaintiff. At one point of time the present plaintiff as well as the defendant no.1 were having a joint business of cycle stand. However, subsequently the present plaintiff started his own business. It is his case that in the year 1991 the defendants started creating obstruction to him for use of the said passage. Hence he filed the present suit.

10. In this appeal before me Shri S.G.Deshmukh, learned Advocate for the Appellant has urged several

points including the plaint that 12’ width passage though mentioned in the sale deed of the purchasers of ‘Saraswati Niwas’ they were not entitled to have passage of such width because for ingress and egress to property ‘Saraswati Nivas’, passage of 6’ width portion was sufficient. The passage involved in the present suit and the passage involved in Second Appeals 82 of 1984 and 83 of 1984 is one and the same. All the objections raised by the present Appellant original defendant with regard to the said passage have been elaborately considered in the above mentioned second appeals and it has been held that by virtue of registered sale deed executed on 20-5-1953 by the Court Commissioner in favour of Bhats easement by grant in respect of the suit passage was created in favour of Bhats and the occupants of ‘Saraswati Niwas’ as well as Rama Niwas were also given right to use the said passage. Thus, though in the instant case the defendant has tried to show that common passage or right of easement which has been given to Bhats and other occupants is not in respect of 12’ width portion but it is only in respect of 5’ to 6’ width portion as such portion is only necessary for ingress and egress, the said contention cannot be accepted in the teeth of specific mention in the sale deed that 12’ width passage is kept as shown in the map ABCD. So, it is crystal clear that it was not a case of easement of necessity but it is in fact a

case of easement by grant.

11. Shri Deshmukh, learned Advocate for the defendant argued before me that equitable relief of permanent injunction should not be granted in favour of the plaintiff because in Regular Civil Suit NO.21 of 1978, he in fact sided with the present defendant and all of them together opposed the claim of Bhats. Not only that even in the first appellate Court also the present plaintiff Vinayak Agaskar was with him but only after the time the second appeal No.82 of 1984 and 83 of 1984 were admitted and one co-sharer viz. Vasant sold property allotted to his share to Koli i.e. original defendant no.2 in the instant case, plaintiff filed the present suit. It is urged that present plaintiff in fact took the fruits of the joint business which he was having with the defendant no.1 and for that earlier took the stand that Bhats were given right in respect of 5’ to 6’ width passage and 12’ width portion was never kept open but on the contrary material of the Criminal Court was lying in the portion to the extent of 5’ to 6’ width portion. So, plaintiff is not entitled to discriminatory relief of injunction. However it must be mentioned that admittedly property bearing A1 shown in the map is allotted to the share of the present plaintiff and right of way through suit passage is given to present plaintiff. If anybody is causing obstruction to

plaintiff in having beneficial enjoyment of the said property and for that purpose not allowing him to use the passage of 12’ width, he is certainly entitled to make grievance about the same. Merely because earlier he had done business along with defendant no.1 and both of them had fought against Bhat that by itself will not legally preclud him from filing the present suit. So, there is no substance in the argument advanced by the learned Advocate for the defendant no.1 in this behalf.

12. Even if we take into consideration the substantial question that has been formulated as mentioned above it is very clear that all those points were taken by the present defendant in earlier appeals bearing Second Appeal Nos.82 of 1984 and 83 of 1984 and the same have been rejected. So, the same cannot be canvassed in the present appeal. It is an admitted fact that after the time injunction was granted against the defendants in Regular Civil Suit No.21 of 1978 the defendants had in fact stopped parking vehicle in the suit passage. According to the plaintiff it is only after the death of Chhotelal Bhat the obstruction started from the defendants and that necessiatated the present plaintiff to file the present suit.

13. Though the learned Advocate for the defendant

has argued that the plaintiff is not entitled to get relief of injunction because of the provision of Section 41G of the Specific Relief Act 1963 it must be held that there is no sufficient evidence on record to show that plaintiff had accepted the breach committed by the defendants vis-a-vis the rights of the plaintiff or that he had given implied consent or acquiesced. The provisions of Section 41G or 41I of Specific Relief Act are certainly not applicable to the facts of the present case. Hence I am not inclined to accept the argument advanced by the learned Advocate for the defendant in this behalf.

14. As observed in Second Appeal No.82 of 1984 and 83 of 1984 the suit passage in question is of 12’ width the plaintiff is also having a right to use the said passage for approaching his property i.e. property A1 shown in the map Exh.40 attached to the final decree Exh.79. In the final decree Exh-79 it is clearly mentioned that present Plaintiff is having a right to use the suit passage. As the defendants are obstructing him in use of the said passage, both the courts below were justified in granting permanent injunction against the defendants. The finding recorded by the first appellate court is legal and correct. There is no necessity to interfere with the same. Hence the appeal is dismissed with costs.

(S.R.SATHE,J.)